STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PAUL MAURIELLO, Charging Party, v. BAY AREA AIR QUALITY MANAGEMENT DISTRICT EMPLOYEES ASSOCIATION, Respondent.	Case No. SF-CO-39-M PERB Decision No. 1808-M January 13, 2006

Appearances: Peter Rogosin, Representative, for Paul Mauriello; Sinclair Law Office by Andrew Thomas Sinclair, Attorney, for Bay Area Air Quality Management District Employees Association.

Before Whitehead, Shek and Neuwald, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Paul Mauriello (Mauriello) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the Bay Area Air Quality Management District Employees Association (Association) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to represent Mauriello at a pre-termination hearing (Skelly[2] hearing) on January 21, 2004, and failing to provide him representation and/or assistance with two grievances filed on January 21, 2004 and February 20, 2004.

The Board has reviewed the entire record in this matter, including the original unfair practice charge, the amended unfair practice charges, the warning and dismissal letters of the

[1]MMBA is codified at Government Code section 3500, et seq.

[2]Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] (Skelly).

Board agent, and Mauriello's appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

On July 8, 2005, Mauriello submitted to the Board a copy of the arbitrator's award in his termination grievance filed on February 20, 2004. Since the February 20, 2004 grievance alleged identical facts and memorandum of understanding violations, and sought similar remedies as those enumerated in the first grievance filed on January 21, 2004, the parties mutually agreed to file the second grievance pursuant to Step 2 of the grievance procedure. The grievance was submitted to arbitration, and on June 30, 2005, an arbitrator awarded Mauriello reinstatement to his former position minus a sixty-day suspension without pay.

The arbitration award is new evidence presented for the first time on appeal. Pursuant to PERB Regulation 32635(b)[3], "[u]nless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." In this case, the arbitration award was not available prior to June 30, 2005, therefore, the award can be considered. However, the arbitration award neither diminishes nor supplants the Association's reasoned decision not to represent Mauriello in the matter of his termination at the Skelly hearing or in other grievance proceedings. The favorable arbitration award does not necessarily imply the Association had acted in an arbitrary, discriminatory, or bad faith manner when denying representation to Mauriello. In the absence of evidence to demonstrate that the Association's decisions not to provide representation to Mauriello were discriminatory,

[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

arbitrary or in bad faith, we conclude that the Association's conduct did not constitute a violation of the duty of fair representation.

ORDER

The unfair practice charge in Case No. SF-CO-39-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neuwald joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax:(510)622-1027

January 10, 2004

Peter Rogosin, Representative
351 Lowell Avenue
Mill Valley, CA 94941

Re: Paul Mauriello v. Bay Area Air Quality Mgmt Dist EA
Unfair Practice Charge No. SF-CO-39-M
DISMISSAL LETTER

Dear Mr. Rogosin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 27, 2004 and amended on September 16, 2004. The initial charge alleges that the Bay Area Quality Management District Employees Association (Association) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to represent Paul Mauriello at a disciplinary hearing on January 21, 2004, and failing to provide him assistance with a grievance filed that same date. The amended charge also alleges that the Association violated the MMBA by failing to represent Mr. Mauriello in a grievance filed on February 20, 2004.

I indicated to you, in my attached letter dated September 2, 2004, that the allegations contained in the initial charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge, which you did on September 16, 2004.

The amended charge states that Mr. Mauriello filed a second grievance with the employer on February 20, 2004, based on his termination on February 11, 2004. The grievance contained some assertions not previously raised, including procedural violations of the MOU. He requested assistance from the union and was again refused. Subsequently, the matter went to mediation with the employer and is currently scheduled for arbitration.

While the amended charge contains numerous arguments and legal conclusions as to why a complaint should issue, it is lacking in the necessary elements, i.e., additional facts which correct the deficiencies in the initial charge. That is, no factual evidence is set forth to support the conclusion that the Association acted arbitrarily or capriciously, or harbored personal hostility or bias toward Mr. Mauriello.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Most of Mr. Mauriello's arguments rest on the premise that he "had absolute right to expect [Association] representation at grievance meetings with management and to prepare his defense during any and all stages of the pre-disciplinary and post-disciplinary process." This premise is without merit.

As stated in the attached letter, a union has no duty to represent its members in a Skelly proceeding. (Professional Engineers in California Government (Lopez) (1989) PERB Decision No. 760-S; Service Employees International Union, Local 790 (Wardlaw) (1997) PERB Decision No. 1219). Nevertheless, Association board of directors reviewed Mr. Mauriello's situation at a meeting on December 23, 2003, and held a special meeting to hear him present his case on January 13, 2004. The board of directors' recommended that he be denied representation based on his alleged unauthorized re-entry into the District building, the lack of candor and persuasiveness of his explanations for his alleged misconduct, and the unlikelihood of success at arbitration. Mr. Mauriello was given an opportunity to present his case to the membership on January 20, 2004, which then voted to deny him representation. Given the consideration the Association gave to Mr. Mauriello, it cannot be found that the Association's determination to deny him with representation, legal or otherwise, was arbitrary, discriminatory or in bad faith. (California Faculty Association (MacDonald) (1994) PERB Decision No. 1046-H.)

The Association also refused to provide Mr. Mauriello with representation in the two grievances he filed regarding his termination. PERB has held that

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.] A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. (United Teachers of Los Angles (Collins) (1983) PERB Decision No. 258.)

Thus, if a union has made an reasonable determination that a grievance lacks merit, it has not breached its duty of fair representation by refusing to process it. (United Teachers of Los Angeles (Collins), supra, PERB Decision No. 258.) PERB does not decide whether the union's determination is correct, only if it had a "rational basis."

Both the January 21 and February 20, 2004 grievances, filed by Mr. Mauriello concern his termination proceedings. The Association reviewed that matter previously and decided not to provide him with representation. It had no obligation to continue to review new grievances concerning the same underlying issue. As stated above, no facts are alleged in the amended charge which demonstrate that these decisions were discriminatory, arbitrary or in bad faith.

Further, it fulfilled its obligation to explain to Mr. Mauriello why it chose not to represent him. (Oakland Unified School District (Mingo) (1984) PERB Decision No. 447.)
For the reasons stated above, this charge is dismissed.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130,) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulation 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Jerilyn Gelt

Labor Relations Specialist

Attachment

cc: Tom Sinclair

JAG

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
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ARNOLD SCHWARZENEGGER, Governor

December 23, 2004

Peter Rogosin, Representative
351 Lowell Avenue
Mill Valley, CA 94941

Re: Paul Mauriello v. Bay Area Air Quality Management District Employees Association
Unfair Practice Charge No. SF-CO-39-M
WARNING LETTER

Dear Mr. Rogosin:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 27, 2004. The charge alleges that the Bay Area Quality Management District Employees Association (Association) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to represent Paul Mauriello at a disciplinary hearing on January 21, 2004.

Mr. Mauriello was employed as a webmaster by the Bay Area Air Quality Management District (District) at all times relevant to this charge. On or about November 7, 2003, Mr. Mauriello received an email from manager Michael Bachman stating that he wished to interview Mr. Mauriello about his use of District email. Mr. Mauriello attended a meeting with Mr. Bachman on or about November 19, 2003, accompanied by two Association representatives.

At the meeting, Mr. Bachman questioned Mr. Mauriello regarding emails he had sent you, Peter Rogosin, containing screen shots from a compensation survey that was in development at the District. You were not employed by the District at the time, but were formerly employed as acting human resources officer until your separation in approximately April, 2003. Mr. Mauriello and you are involved in a business venture together.

On or about November 20, 2004, Mr Mauriello was given a letter placing him on administrative leave with pay and escorted out of the building by Information Systems Director Jeffrey McKay. Approximately 30 minutes later, Mr. Mauriello allegedly re-entered the building, went to his workstation and deleted computer files. He was again escorted out of the building. According to the Association, Mr. Mauriello did not inform the union of this incident until more than a month after it occurred.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The District notified Mr. Mauriello that a second interview would take place on December 12, 2003, attended by a "special investigator." The Association's attorney researched the legality of this interview, drafted a document for the District's signature aimed at protecting Mr. Mauriello against criminal prosecution, and requested and received a postponement of the interview to ensure that Mr. Mauriello had legal representation at the interview. The interview was held on December 15, 2003. You allege that the Association's attorney "slept through the meeting."

On or about December 19, 2003, Mr. Mauriello received a termination notice. Mr. Mauriello asked the Association for assistance in responding in writing to the charges outlined in the notice. The Association provided no such assistance.

Mr. Mauriello also asked for representation at the pre-termination (Skelly) meeting scheduled with the District. He was informed by Recording Secretary Terry Carter that, since additional money would be needed to provide legal representation, approval by the Association board and membership would be required for the expenditure., Mr. Carter informed Mr. Mauriello that he would have an opportunity to present his case for representation at the board meeting. Mr. Carter advised him that since legal representation by the Association was not assured, he should seek private counsel in case the Association did not provide him with one at the Skelly meeting. [2]

The Association board initially reviewed Mr. Mauriello's case on December 23, 2003, and agreed to schedule a special two hour meeting on January 5, 2004, to allow him an opportunity to present his case.

The Association notified the District that the termination notice had been incorrectly addressed and therefore improperly served. As a result, the Skelly meeting was postponed from an earlier date to January 21, 2004, and the Association board meeting was postponed to January 13, 2004. Mr. Carter notified Mr. Mauriello of these changes and again advised him to seek private counsel, especially in light of the fact that the general membership would not vote on whether to award him legal representation until January 20, 2004, the day before the Skelly meeting.

According to the Association, Mr. Carter and Association President James Corazza spoke with Mr. Mauriello by telephone on or about January 9, 2004, to advise him of his options under the MOU, including hiring a private attorney and pursuing a grievance on his own. This conversation was confirmed by email the next day.

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[2] Section 5.06 (2) of the MOU provides that prior to dismissal, an employee

> will be given an opportunity to address the charges supporting this disciplinary action with the EO prior to the dismissal becoming effective.... The employee may bring a representative of the Association and/or a private personal representative to the meeting with the EO.

The Association board met with Mr. Mauriello as scheduled on January 13, 2004. The meeting lasted approximately 1-1/2 hours. Mr. Mauriello presented his case, and questions and answers followed. Subsequently, the board voted against recommending representation and informed Mr. Mauriello of this decision by telephone later that day. However, the board gave Mr. Mauriello a chance to present his case to the general membership on January 20, 2004.

After Mr. Mauriello was given an opportunity to speak at the Association meeting, the board recommended denying him representation for several reasons: his unauthorized re-entry into the District building, the lack of candor and persuasiveness of his explanations for his alleged misconduct, and the unlikelihood of success at arbitration. The membership voted in support of this recommendation. According to the Association, Mr. Mauriello was informed of this decision by email at approximately 2:30 p.m. on January 20, 2004.

This charge alleges that the Association refused to assist Mr. Mauriello with his written response to disciplinary charges received from the District on or about January 6, 2004. In addition, it alleges that the Association informed him on the date of the Skelly meeting that it would not represent him, leaving no time for preparation for the meeting had the decision been otherwise.

The charge further alleges that the Association refused to represent him in a grievance filed on January 21, 2004, based on a vote of the membership in violation of its bylaws, which only require that such a vote be taken prior to taking a case to arbitration. Mr. Mauriello claims that the Association's decision was influenced by personal animosity toward him. In addition, he asserts that the Association's refusal to represent him was arbitrary and capricious in light of the fact that it had a "history of aggressively pursuing every possible grievance in every possible way."

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr.2d 389].) In Hussey, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332 and American Federation of State, County and Municipal Employees, Local 2620 (Moore*) (1988) PERB Decision No. 683-S, are consistent with the approach of both Hussey and federal precedent (Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]). Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it

becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (International Association of Machinists (Attard) (2002) PERB Decision No. 1474-M.)

In California Faculty Association (MacDonald) (1994) PERB Decision No.l046-H, PERB noted that a "perfunctory" handling of a grievance constituting "arbitrary" conduct "could result from a complete failure to investigate the facts underlying a grievance or an unexplained failure to perform a ministerial duty, typically resulting in a procedural default." As PERB stated in United Teachers of Los Angles (Collins) (1983) PERB Decision No. 258:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.] A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

PERB has held that "there is no duty of fair representation to unit members unless the exclusive representative possesses the exclusive means by which such employee can obtain a particular remedy.. . This is not the case in a Skelly proceeding." (Professional Engineers in California Government (Lopez) (1989) PERB Decision No. 760-S; Service Employees International Union. Local 90 (Wardlaw) (1997) PERB Decision No. 1219.)

In this case, charging party has failed to allege any facts which demonstrate that the Association's actions or inactions were arbitrary, in bad faith, without a rational basis or devoid of honest judgment. On the contrary, it appears that the Association intervened on Mr. Mauriello's behalf with the District on several occasions, provided him with legal assistance regarding the December 12, 2003, meeting with the District, and repeatedly advised him of his rights to employee private counsel and to file a grievance on his own behalf. Furthermore, Mr. Mauriello was given ample opportunity to present his case to the Association board and membership prior to their vote to deny him representation at the Skelly meeting.[3] hi addition, no facts have been presented to support the allegation that the Association was acted in bad faith when it determined not to assist him with his January 21, 2004, grievance.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the

[3] Despite the fact that the Association and the District have incorporated "Skelly rights" into their MOU, the fact remains that the Association does not maintain exclusive control over such a proceeding.

charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before September 20, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jerilyn Gelt
Labor Relations Specialist

JAG